SYED MOHD. AMIN SYED ABDULLAH

v.

BADRIAH AWANG & ORS.

HIGH COURT MALAYA, KOTA BHARU
MOHD. ZAHIR ISMAIL J
[CIVIL SUIT NO. 49 OF 1973]
20 JUNE 1981

CIVIL PROCEDURE: *Action - Two actions in respect of same cause of action - Whether the defence may be struck out where issues of fact and evidence in respect of liability is identical.*

TORT: *Vicarious liability - Principle's liability for agent's wrongful act - Motor-bus driven by employee whether owner liable.*

An accident involving a motor-bus gave rise to two suits, this suit and Civil Suit No. 18/73. The other Civil Suit No. 18/73 has been decided. The motor-bus, owned by the 3rd defendant in this case, was driven by the deceased, Ismail bin Abdul Hamid, who is through his two administrators the plaintiffs in Civil Suit No.18/73 and the 1st and 2nd defendant in this suit.

Two issues arose before the learned Judge in this case:

1. A preliminary submission by the plaintiff's counsel on the points that as the issues of fact and evidence in respect of liability would be identically the same as the Civil Suit No. 18/73 the 1st, 2nd and 3rd defendants in this suit should not be allowed to litigate in this claim.

2. The liability of the 1st, 2nd, 3rd, 4th, and 5th defendants.

Held:

[1] The 1st and 2nd defendants' defence in the instant suit can be struck out since in Civil Suit No. 18/73 they were found to be wholly blamed for the accident. This being the case, it follows therefore the plaintiff's claim against the 4th and 5th defendants should be dismissed.

[2] The 3rd defendant in this case was not a party in Civil Suit No.18/73. It does not therefore appear to have fallen strictly under the principle where the court can strike out the defence by the 3rd defendant on the ground of identity of facts and law.

[3] In the instant case it is admitted that the deceased bus driver was the servant of the 3rd defendant. As the employer of his deceased driver, the 3rd defendant should have known their own precarious position in the event of the claim by his employee, the driver being unsuccessful in Civil Suit No. 18/73. The 3rd defendant being the employer of the deceased bus driver is vicariously liable for the negligence of his servant or agent.

[Judgment entered for the plaintiff against 1st, 2nd and 3rd defendant with costs. Plaintiff's claim against 4th and 5th defendant dismissed with costs.]

Cases referred to:

Ilkiw v. Samuels & Ors. [1963] 1 WLR 991
Kay v. I.T.W. Ltd [1968] 1 QB 140
Re Application of Asia Insurance Co. Ltd. Osman v. Tan Swee Liang [1968] 2 MLJ 228
Tong Swee King v. Pegang Mining Co. Ltd. & Ors. [1967] 2 MLJ 214

Other sources referred to:
Annual Practice 1976, p. 314
Clerk and Lindsell on Torts, 13th edn., p. 133

For the plaintiff - P. Vijendran
For the 1st & 2nd defendants - K. G. Pillay
For the 3rd defendant - Dato' H. L. Wrigglesworth
For the 4th & 5th defendants - K. Thayalan

JUDGMENT

Mohd. Zahir Ismail J:

When this Civil Suit came up for hearing on 12 May 1981, Counsel for the plaintiff made a preliminary submission on the point that 1st, and 2nd and 3rd defendants should not be allowed to defend this case in view of the decision in Civil Suit No. 18/73. Counsel had earlier filed an affidavit alleging that the pleadings in the present action, the issues of fact and the evidence in respect of liability would be identically the same as in the other case and therefore these defendants should not be allowed to litigate in this claim. Counsel quoted Annual Practice 1976, p. 314 which reads as follows:

> It is an abuse of the process of law for a suitor to litigate again over an identical question which has already been decided against him even though the matter is not strictly *res judicata.*

However, there is a slight difference in these two cases. In Civil Suit No. 18/73, the parties are as follows:

1. Badriah binti Awang @ Baradiah binti Awang Kali 2. Rosli bin Ismail	)	as administrators of the estate of Ismail bin Abdul Hamid, deceased ...plaintiffs
1. Abu Kasim bin Ishak 2. Sathiah s/o Sinakaruppan 3. Malayan Railways 4. Government of Kelantan	)	...Defendants

Abu Kassim and Sathiah are the train driver and fireman of the 3rd defendant.

The claim in both suits arose from an accident involving a motor-bus owned by 3rd defendant in Civil Suit 49/73 and driven by the deceased Ismail bin Abdul Hamid who is through his administrators the plaintiff in Civil Suit No. 18/73 and defendants 1 and 2 in Civil Suit 49/73.

Thus, in Civil Suit 18/73 the 3rd defendant in Civil Suit 49/73 was not a party. It does not therefore appear to have fallen strictly under the principle where the Court can strike out the Defence by the 3rd defendant on the ground of identity of facts and law. The Annual Practice 1976 at p. 315 stipulated that the facts must be between the same parties.

But I am of the opinion that 1st and 2nd defendants' Defence in the instant suit can be struck out as in Civil Suit 18/73 I had decided was wholly to be blamed for the accident. This being the case, it follows therefore the plaintiffs claim against 4th and 5th defendants should be dismissed.

The only question now left is whether 3rd defendant being the employer of the deceased bus driver is vicariously liable for the negligence of his servant or agent.

It appears that he is so vicariously liable. *Clerk and Lindsell on Torts,* 13th edn. at p. 133 states as follows:

> Where the relationship of master and servant exists, the master is liable for the torts of the servant so long as they are committed in the course of the servant's employment. The nature of the tort is immaterial and the master is liable even where liability depends upon a specific state of mind and his own state of mind is innocent.

In *Ilkiw v. Samuels & Ors.* [1963] 1 WLR 991 it was held that the employer was liable for an act of his lorry driver done even in an unauthorised way.

In *Kay v. I.T.W. Ltd* [1968] 1 QB 140 it was similarly held that the employer was liable for an act of servant, a driver of a fork lift truck.

In the instant case, it is admitted that the deceased bus driver was the servant of the 3rd defendant. As the employer of his deceased driver the 3rd defendant should have known their own precarious position in the event of the claim by his employee, the driver being unsuccessful in Civil Suit 18/73. In fact all suits in all claims brought by all other persons injured in the same accident were stayed at the request of Counsel concerned pending the decision of case No.18/73. One might have the impression then that the decision in Civil Suit 18/73 would be binding on the other cases.

In the hearing of Civil Suit No. 18/73, the Solicitor for the 3rd defendant gave evidence on behalf of the plaintiff. In fact the Solicitor visited the scene, took measurements and took photographs which were introduced as evidence in that case. Counsel for the Insurer of the 3rd defendant also was present, holding a watching brief on behalf of the Insurance Company.

After my decision in Civil Suit 18/73, the plaintiff did not appeal and neither the Insurer nor the employer, 3rd defendant, intervened as interested parties even though they were obviously affected by the judgment.

In *Re Application of Asia Insurance Co. Ltd. Osman v. Tan Swee Liang* [1968] 2 MLJ 228 it was held that although the applicants were strangers to the action they were still entitled to make the application on the ground that they might be seriously affected by the judgment. There is another earlier case *Tong Swee King v. Pegang Mining Co. Ltd. & Ors.* [1967] 2 MLJ 214 where the Insurance Company was permitted to intervene.

However, in all these cases the 3rd defendant has had a much better opportunity than merely to intervene. They could have and should have applied to add themselves as plaintiffs or better still applied for their own case where they are the plaintiffs where they were suing for damages on account of their damaged bus to be joined and heard together with Civil Suit 18/73. They should have done this knowing that any decision affecting their employee would affect them. Indeed they have filed the Civil Suit No. 47/73 claiming for RM21,800 damages to the bus quoting the following parties:

Syarikat Kenderaan
Melayu Kelantan Bhd. ...Plaintiff

1. Abu Kasim bin Ishak)
2. Sathiah s/o Sinakaruppan)
3. Malayan Railways)
4. Government of Kelantan) ...Defendants

They failed to make the necessary application to join this case with Civil Suit 18/73. They waited for the decision of Civil Suit 18/73. After such decision had been delivered, they cannot be heard to say that they were not liable. On the principle of vicarious liability they are liable.

I therefore enter judgment for the plaintiff against, 1st, 2nd and 3rd defendants with costs. I dismiss the plaintiff's claim against 4th and 5th defendants with costs.

Now I shall proceed to hear evidence on the quantum.

Also found at [1981] CLJ 172